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No. 06-457

Supreme Court, U.S.
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In The
Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA AND 35 OTHER STATES IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4)(A), preempts states from exercising their historic public health police powers to regulate carriers that deliver contraband such as tobacco and other dangerous substances to children; and

2. Whether the FAAAA preempts states from exercising their historic public health police powers to require shippers of contraband such as tobacco and other dangerous substances to utilize a carrier that provides age verification and signature services to ensure that such substances are not delivered to children.

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INTEREST OF AMICI

Amicus State of California and the other amici states urge the Court to grant certiorari in this case. The First Circuit held that federal law preempts a Maine statute that is designed to curb tobacco sales to children by requiring carriers to comply with modest delivery and labeling restrictions. Unless reversed, the decision will undermine the most effective and practical tool that states employ to restrict illegal sales of tobacco to children over the Internet.

Internet tobacco sites have increased more than eight-fold in recent years. Unfortunately, a majority of online tobacco retailers violate state laws that bar tobacco sales to children. Online sellers simply do not enforce age restrictions. States have been working together on aggressive law enforcement strategies to quell this insidious problem. Several have sued Internet tobacco retailers who flout state laws prohibiting or severely restricting the transport and delivery of tobacco products to their citizens.

The most effective method to prevent illegal sales to children via the Internet and other non-face-to-face means, however, is to regulate the carriers that transport and deliver the products. Statutes such as Maine's Tobacco Delivery Law thwart minors attempting to purchase cigarettes or other tobacco products over the Internet by requiring carriers to comply with simple delivery and age-verification requirements when a package is labeled as "tobacco." At least 29 states prohibit or severely restrict the direct delivery of tobacco products to consumers purchased from Internet vendors.

The decision below undercuts these laws by declaring that the FAAAA preempts much of Maine's scheme.

Moreover, the lower court's selective reading of this Court's preemption cases not only threatens other states' tobacco laws, but also threatens state restrictions on the delivery of other dangerous products that have been traditionally regulated under states' police powers, including guns, liquor, drugs, pornography, tear gas, and wild animals.

The amici states urge the Court to grant the writ of certiorari requested by the Attorney General of Maine and clarify this significant area of preemption law.

REASONS TO GRANT THE PETITION

1. THE STATES' ABILITY TO REGULATE THE TRANSPORTATION AND DELIVERY OF TOBACCO PRODUCTS IS CRUCIAL TO CURB RAMPANT ILLEGAL TOBACCO SALES TO MINORS

The Court has recognized that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant public health problem in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). This problem has become substantially more difficult to solve due to the recent boom in sales of tobacco products over the Internet.

Illegal Internet tobacco sales have reached epidemic proportions. The number of Internet cigarette vendors has risen from 88 in January 2000 to 772 in January 2006.[1] Unlike purchasing tobacco products in a brick-and-mortar

[1] Ribisl KM, Kim AE, Williams RS. Sales and marketing of cigarettes on the Internet: Emerging threats to tobacco control and promising policy solutions *in Reducing tobacco use: Strategies, barriers, and consequences.* Washington, D.C.: National Academy Press; In press.

store, where the seller can look the person in the eye and carefully examine the customer's government identification to ensure that the person is of legal age to purchase tobacco products, there is no standard, reliable method of online age-verification. The vast majority of Internet cigarette vendors simply do not prevent youths from purchasing cigarettes online. While 79.7% of vendors include minimum age warnings on their home pages, only 26.7% feature them at the top of the page where they can be viewed without scrolling, the prevailing standard for Web design.[2] Such warnings are no substitute for valid age-verification procedures, and many of these warnings are likely to be missed by users. Internet cigarette vendors commonly use self-verification methods, asking users to type in a birth date (used by 18.8% of vendors) or stating a disclaimer that by submitting an order, the customer is certifying that he/she is of legal age to purchase cigarettes (used by 31.5% of vendors). Only a handful of vendors use minimally adequate age-verification methods, such as requiring the submission of a photo ID (used by 7.7% of vendors) or age-verification at delivery (used by 10.1% of vendors).[3] California conducted an investigation that exposed the significant problem with Internet tobacco sales. Children visited 234 web sites and were able to purchase a carton of cigarettes from 129 sites. Only a few Internet retailers did anything more than ask the

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[2] Williams RS. Youth access to cigarettes online: *Advertised and actual sales practices of Internet cigarette vendors* [Dissertation]. Chapel Hill: health Behavior and Health Education, University of North Carolina of Public Health; 2005.

[3] *Id.*

prospective purchaser to state that he or she was at least 18 years old.[4]

In response, at least 25 states, including Maine, severely restrict Internet tobacco sales to consumers.[5]

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[4] Sting conducted in 2001 by San Diego State University researchers retained by the California Attorney General's Office involving 30 underage decoys.

[5] Alaska (ALASKA STAT. § 43.50.105 (Michie 2005)); Arizona (ARIZ. REV. STAT. ANN. § 42-3221 (West 2006)); California (CAL. BUS. & PROF. CODE § 22963 & CAL. REV. & TAX. CODE § 30101.7 (West 2006)); Delaware (DEL. CODE ANN. TIT. 30 § 5361 (West 2006)); Hawaii (HAW. REV. STAT. ANN § 245-16 (Michie 2005)); Idaho (IDAHO CODE § 39-5714 (West 2006)); Illinois (720 ILL. COMP. STAT. ANN. 678/5 (West 2006); Indiana (IND. CODE ANN. § 24-3-5-5 (West 2006)); Louisiana (LA. REV. STAT. ANN. § 47:872 (West 2006)); Michigan (MICH. COMP. LAWS ANN. § 205.431 (West 2006)); Minnesota (MINN. STAT. ANN. §§ 325F.781 and 297F.031 (West 2006)); Missouri (MO. ANN. STAT. §§ 407.924 to 407.926, and 407.934 (West 2006)); Mississippi (MISS. CODE ANN. §§ 97-32-3 and 97-32-5 (West 2006)); Montana (MONT. CODE ANN. §§ 16-11-102, 16-11-104, 16-11-128, 16-11-129, 16-11-131, 16-11-142 and 16-11-148 (West 2005)); Nevada (NEV. REV. STAT. §§ 370.0285, 370.321 to 370.329, and 370.425 (West 2005)); Ohio (OHIO REV. CODE ANN. §§ 2927.023, 5743.01, 5743.15, 5743.16, 5743.20 and 5743.71 (West 2005-2006)); Oklahoma (OKLA. STAT. ANN. TIT. 68 §§ 301, 304 and 317.1 et seq. (West 2006)); Oregon (OR. REV. STAT. §§ 323.500 and 323.700 et seq. and 323.482 (West (2005)); Pennsylvania (PA. STAT. AND CONS. STAT. ANN. § 231-A (West 2006)); Rhode Island (R.I. GEN. LAWS § 44-20.1 to 44.20-9 and 11-9-13.4 (West 2005)); South Dakota (S.D. CODIFIED LAWS §§ 10-50-93 et seq. (West 2006)); Tennessee (TENN. CODE ANN. §§ 67-4-1001 and 67-4-1029 (West 2006)); Texas (TEX. HEALTH & SAFETY CODE §§ 161.451 to161.462 (Vernon 2006)); Utah (UTAH CODE ANN. § 76-10-105.1 (West 2006)); Virginia (VA. CODE ANN. §§ 18.2-246.6 to 18.2.2-246.15 (West 2006)); Washington (WASH. REV. CODE ANN. § 70.155.105 (West 2006)); West Virginia (W. VA. CODE §§ 16-9E-1 to 19-9E-7 (West 2006)); Wyoming (WYO. STAT. ANN. §§ 39-18-101, 39-18-106 and 39-18-108 (Michie 2006)).

Although states differ in the restrictions they impose, typically they provide that:

> 1. Retailers at the time of the sale, and/or carriers upon delivery, must verify that the purchaser is an adult;
>
> 2. Retailers must be licensed by the state; and
>
> 3. Containers must be labeled as containing cigarettes or tobacco products.

Four states, Connecticut, New York, Maryland and Arkansas, have banned outright the delivery and sale of cigarettes to individual consumers.[6]

The First Circuit decision undercuts these laws. If the First Circuit's construction of the FAAAA stands, the states may lose their most effective means of preventing children from purchasing tobacco products over the Internet.

2. THE DECISION BELOW CREATES SUBSTANTIAL UNCERTAINTY REGARDING STATES' ABILITY TO PROSECUTE VIOLATORS OF LAWS REGULATING THE TRANSPORT AND DELIVERY OF TOBACCO PRODUCTS

The First Circuit held that Maine's ban on the *knowing* delivery of contraband tobacco is not preempted by the FAAAA even though it pertains to carrier services because

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[6] CONN. GEN. STAT. ANN. § 12-285c (West 2006); N.Y. PUBLIC HEALTH LAW § 1399-*ll* (McKinney 2005); MD. CODE ANN. (BUS. REG.) §§ 16-222 AND 16-223(b)(1) (West 2006); ARK. CODE ANN. §§ 26-57-203 AND 26-57-215 (Michie 2006).

the provision requires only that carriers do not act as knowing accomplices in the illegal sale of tobacco products, and it does not require carriers to modify their delivery methods other than by declining to transport products that Maine legitimately banned. *New Hampshire Motor Transport Ass'n v. Rowe*, 448 F.3d 66, 80 (1st Cir. (Me.) May 19, 2006). By contrast, the court determined that the provision imputing knowledge to the carrier – that it was delivering contraband tobacco products from the markings or labels on the package – was preempted because that provision would impact the uniform operations of the carrier by requiring reading and comprehending the labels and markings.

The First Circuit's ruling is ambiguous and contradictory and puts the states in a quandary about which laws will run afoul of the constitution and which ones will not. The import of the decision is to take away the only effective and identified means by which the states can prove violations of their tobacco delivery laws imputing knowledge to the carrier from the markings or labels on the package. Prohibiting states from proving that carriers know they are delivering tobacco products to children when the delivery containers are clearly labeled as containing tobacco products hamstrings the states' ability to prosecute sellers of contraband tobacco over the Internet. For example, California regulates non-face-to-face tobacco sales. Business & Professions Code section 22963 primarily regulates the conduct of retailers, but also provides for enforcement against carriers if they deliver tobacco products with reason to know the package's contents.

> For the purposes of enforcement of this section pursuant to Section 22958, the acts of the United States Postal Service or other common carrier

> when engaged in the business of transporting and delivering packages for others ... who transports or delivers a package *without any reason to know of the package's contents*, are not unlawful and are not subject to civil penalties.

Section 22963, subdiv. (d); italics added.

One way to prove that the carrier did have knowledge of the package's contents is to impute knowledge to the carrier if the package is marked, as required by California Revenue & Taxation Code § 30101.7, to contain cigarettes. According to the First Circuit, however, if a carrier delivers a package labeled as containing cigarettes to a child, law enforcement officials could not prevail against the carrier in an action alleging violations of the age-verification provisions of section 22963, based on imputed knowledge that the package contains cigarettes.

Moreover, the First Circuit's decision may well jeopardize state laws that ban the transport or delivery of tobacco products outright. The court held that the knowing delivery of tobacco products is not preempted by the FAAAA, because carriers need not modify their delivery methods other than by declining to transport a product the state has legitimately banned. *New Hampshire Motor Transport Ass'n v. Rowe*, 448 F.3d 66, 80. As a practical matter, however, the way to prove a carrier *knowingly* delivered tobacco products is to impute knowledge to the carrier if the package was labeled "cigarettes" or "tobacco" and by the fact that the package was delivered to a consumer as opposed to one of the excepted persons – e.g., a state-licensed tobacco distributor or retailer – set forth in the statute. The First Circuit's decision effectively nullifies state statutes banning outright the delivery of tobacco products because states are prohibited from using the only

practical means they have to prove violation of these laws. Simply put, under the First Circuit's analysis even statutes banning the *knowing* delivery of contraband tobacco might not pass constitutional muster in application, unless the basis of the *knowing* violation is that the carrier was specifically told that the package contained tobacco products and, despite that knowledge, delivered them anyway – an unlikely scenario.

3. THE DECISION BELOW CALLS INTO QUESTION STATE HEALTH AND SAFETY LAWS TOUCHING ON THE TRANSPORT AND DELIVERY OF A MYRIAD OF DANGEROUS PRODUCTS

The First Circuit's ruling, that the FAAAA preempts Maine's Tobacco Delivery Law, is especially troubling because its reasoning is not limited to tobacco. It jeopardizes states' enforcement efforts in other health or safety-related areas and has the potential to change the entire landscape of regulating transportation and delivery of dangerous products.

All across the nation states have enacted laws barring or regulating the transport and delivery of dangerous or contraband products including such diverse items as tear gas and tear gas weapons,[7] weapons,[8] used bee supplies that could create a disease hazard,[9] fur, hair, skin or flesh

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[7] CAL. BUS. & PROF. CODE § 17533.9 (West 2006).

[8] ARIZ. REV. STAT. ANN. § 13-3102 (West 2006).

[9] ALA. CODE § 2-14-5 (West 2006).

of domesticated dogs or cats,[10] alcoholic beverages,[11] fuel,[12] wild animals,[13] pornography,[14] and prescription drugs.[15] The First Circuit's ruling calls into question each and every one of these laws.

One type of law put at risk by the First Circuit's decision is the Model Direct Shipping Bill, developed by the National Conference of State Legislatures, which requires an adult signature for the delivery of wine and a label so instructing on each package. The importance of this model law was emphasized by the Court in *Granholm v. Heald,* 544 U.S. 460 (2005), a case invalidating two states' laws regulating the sale and importation of wine as violative of the Commerce Clause. The Court responded to the state's claim that direct shipping of wine increases the risk of underage drinking by noting that the states can take less restrictive steps to minimize the risk that minors will order wine by mail. The Court suggested that the states could, for example, adopt the Model Direct Shipping Bill to minimize the risk. Under the First Circuit's analysis, the states' ability to invoke this procedure to protect children from receiving wine by mail would likely be preempted because, like Maine's Tobacco Delivery Law, the statute "relates to" carrier services.

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[10] N.Y. AGRIC. & MKTS. LAW § 96-h (West 2006).

[11] MASS. GEN. LAWS ANN. ch. 138, § 22 (West 2006)

[12] FLA. STAT. Ann. § 206.20 (West 2006).

[13] OHIO REV. CODE ANN. § 1533.31 (West 2005-2006).

[14] HAW. REV. STAT. ANN. § 707-751 (Michie 2005).

[15] FLA. STAT. ANN. § 499.028 (West 2006).

4. THE COURT SHOULD TAKE THIS CASE TO RESOLVE THE CONFLICT BETWEEN THE BROAD, UNWORKABLE PREEMPTION STANDARD OF THE *MORALES* CASE AND THE PRACTICAL, NARROW RULE OF THE ERISA CASES

As argued in section II of Maine's Petition for a Writ of Certiorari, the First Circuit's overly expansive, impractical reading of the preemption provision of the FAAAA, based on this Court's construction of an identical provision in the Airline Deregulation Act of 1978 (ADA) in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), conflicts with the narrower interpretation the Court has adopted in cases decided after *Morales* that analyze the Employee Retirement Income Security Act of 1974 (ERISA), including *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645 (1995) and *Cal. Div. of Labor Standards Enforcement v. Dillingham Construction, N.A.*, 519 U.S. 316 (1997).

The *Morales* standard should not be applied to preempt Maine's Tobacco Delivery Law because after deciding *Morales,* this Court determined that the broad, expansive preemption standard of the *Morales* case was unworkable, and according to Justices Scalia and Ginsberg, "doomed to failure." *Dillingham*, 519 U.S. at 335 (Scalia, J., concurring). The First Circuit, however, rejected this Court's reasoning in *Dillingham* stating that "[I]f developments in pension law have under-cut holdings in air-transportation law, it is for the Supreme Court to make the adjustments." *New Hampshire v. Rowe,* 448 F.3d 66, 76.

The Court should accept the First Circuit's invitation to decide the appropriate standard to be applied in this case. Specifically, the Court should decide whether to use the virtually limitless, dictionary definition of "relating to" – set forth in *Morales* as any state law having a "connection with or a reference to" airline rates, routes, or services – or instead the practical approach that the Court took in the ERISA cases. Under the latter approach, courts would consider the objectives of the statute and the nature and effect of the state's law when determining whether the FAAAA preempts the state's law. *California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc.* 519 U.S. 316, 325. Unless the Court accepts this case for review and decides which standard is appropriate, the potential for chaos is great because the states cannot tell whether their tobacco delivery laws will be preempted based on the broad brush strokes of *Morales*, or whether they will pass constitutional muster based on the narrower, more practical standard of the ERISA cases. Statutes that have only a tenuous, remote, or peripheral connection with rates, routes and services should not be preempted. The First Circuit's decision calls into question the constitutionality of each and every state statute regulating the transportation and delivery of tobacco and other illegal or dangerous products.

CONCLUSION

The amici states urge the Court to grant the writ of certiorari requested in this case by the Attorney General of the State of Maine.

Dated: October 24, 2006

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